STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
The Hon. Pat M. Donofrio, the Hon. Kirsten Frank Kelly and the Hon. Jane M. Beckering

LORI CALDERON, as Guardian of ARTHUR KRUMM, a Legally Incapacitated Person,

Plaintiff/Counter-Defendant-Appellee,

and

FUNCTIONAL RECOVERY, INC.,

Intervening Plaintiff/Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellant.

Supreme Court No. 138805

Court of Appeals No. 283313

Lower Court No. 06 602100 NF

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SUPPLEMENTAL BRIEF OF DEFENDANT/COUNTER-PLAINTIFF-APPELLANT AUTO-OWNERS INSURANCE COMPANY AS AUTHORIZED BY SUPREME COURT ORDER OF APRIL 16, 2010

Dated: May 27, 2010

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STATEMENT OF THE QUESTION PRESENTED

SHOULD THE SUPREME COURT REVIEW AND REVERSE A DECISION THAT A QUESTION OF FACT EXISTED AS TO WHETHER A PERSON WAS DOMICILED WITH A RELATIVE AT THE TIME OF AN AUTOMOBILE ACCIDENT WHEN THE ONLY WAY A JURY COULD CONCLUDE THE PERSON WAS DOMICILED WITH THE RELATIVE WAS BY RELYING ON HEARSAY AND ENGAGING IN GUESS, CONJECTURE AND SPECULATION AS TO THE PERSON'S INTENT TO RETURN TO THE RELATIVE'S HOME?

The Plaintiff/Counter-Defendant-Appellee Lori Calderon, as Guardian of Arthur Krumm, a Legally Incapacitated Person (hereinafter referred to as Plaintiff), would presumably contend that the answer to the question should be "**No.**"

The Intervening Plaintiff-Appellee Functional Recovery, Inc. (Intervening Plaintiff) would also presumably contend that the answer to the question should be "**No.**"

The Defendant/Counter-Plaintiff-Appellant Auto-Owners Insurance Company (Auto-Owners) respectfully suggests that the answer to the question should be "**Yes.**"

The trial court, the Honorable John A. Murphy (Judge Murphy) of the Wayne County Circuit Court, was not asked the question.

The Court of Appeals, the Honorable Pat M. Donofrio (Judge Donofrio), the Honorable Kirsten Frank Kelly (Judge K.F. Kelly) and the Honorable Jane M. Beckering (Judge Beckering), was not asked the question.

STATEMENT OF FACTS

Auto-Owners relies on the **Statement of Facts** submitted as part of its May 4, 2009 Application for Leave to Appeal, previously filed with this Supreme Court, as supplemented in Auto-Owners' June 11, 2009 Reply to the joint Answer to the Auto-Owners Application filed by Plaintiff and Intervening Plaintiff. Auto-Owners notes that on April 16, 2010 this Supreme Court issued an Order which provided as follows:

> On order of the Court, the application for leave to appeal the March 24, 2009 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

This Supplemental Brief is respectfully submitted to the Supreme Court in accordance with the guidance issued in the April 16, 2010 Order, and is why Auto-Owners is relying on its previously submitted Application and Reply for its **Statement of Facts** in the instant document.

INTRODUCTION

In its May 4, 2009 Application for Leave to Appeal, Auto-Owners presented but a single issue for review by this Supreme Court. The issue was, at bottom, what minimum evidence there must be in the record for a question of fact to exist as to whether a person was domiciled with a relative at the time of an accident for the purposes of MCL 500.3114(1). The Plaintiff and Intervening Plaintiff did not file either their own application from the March 24, 2009 decision and opinion of the Court of Appeals or a cross-application from Auto-Owners' Application. Further, the Supreme Court did not ask in its April 16, 2010 Order that the parties address any other issue,

merely gave the parties the option of submitting a supplemental brief. As noted *supra*, the supplemental briefs were not to merely restate their "application papers."

Auto-Owners wishes to take this opportunity graciously extended to it by the Supreme Court to emphasize certain points that demonstrate the errors in the decision and opinion of the Court of Appeals and why the decision and opinion should be reversed or at the very least given full review by this forum. Every effort will be made to avoid including anything that might be considered a mere restatement of the argument made by Auto-Owners in its Application and Reply.

ARGUMENT

THE SUPREME COURT SHOULD REVIEW AND REVERSE A DECISION THAT A QUESTION OF FACT EXISTED AS TO WHETHER A PERSON RESIDED WITH A RELATIVE AT THE TIME OF AN AUTOMOBILE ACCIDENT WHEN THE ONLY WAY A JURY COULD CONCLUDE THE PERSON WAS A RESIDENT WAS BY RELYING ON HEARSAY AND ENGAGING IN GUESS, CONJECTURE AND SPECULATION AS TO THE PERSON'S INTENT TO RETURN TO THE RELATIVE'S HOME.

I. The provisions of MCR 2.116(C) *et seq.* and specifically MCR 2.116(G)(4) should be respected by the bar and strictly enforced by the bench.

Auto-Owners moved for summary disposition in the trial court after the close of discovery on the basis of MCR 2.116(C)(10), no material issue of fact in dispute between the parties, the court may determine the rights of the parties as a matter of law. MCR 2.116(C)(10) was adopted as part of the comprehensive revision and replacement of the Michigan General Court Rules of 1963 by the Michigan Court Rules of 1985. Under MCR 2.116(C)(10)'s predecessor, GCR 117.2(3), it was sometimes possible for nonmovants to defeat motions for summary judgment on the basis of bare allegations. See, generally, *Rizzo v Kretschmer*, 389 Mich 363, 377; 207 NW2d 316 (1973). MCR 2.116(G)(4) and MCR 2.116(H) *et seq.* were added to the 1985 court rules to preclude this, and an extensive body of case law has developed since 1985 establishing the need for a nonmovant

to oppose a MCR 2.116(C)(10) motion with admissible evidence that demonstrates there is a genuine dispute as to a material fact. See, for example, *Jubenville v West End Cartage, Inc.*, 163 Mich App 199, 205-208; 413 NW2d 705 (1987), *lv den* 429 Mich 880 (1987) and *Metropolitan Life Insurance Company v Reist*, 167 Mich App 112, 118; 421 NW2d 592 (1988), *lv den* 431 Mich 876 (1988).

In the case at bar, the Plaintiff's ward never gave any oral or written testimony concerning his belief that his "real" domicile was with his grandmother in Michigan, and that his residence in Arkansas with his wife and his sojourn in North Carolina were merely transient experiences. It is acknowledged that the ward is presently legally incapacitated, but he was not in that condition prior to the accident. It would be one thing if the Plaintiff and Intervening Plaintiff had letters, e-mails, voicemails or answering machine messages from the ward relative to what he considered his "real" domicile at the time of the accident, but they have nothing of the sort. At bottom, all the Plaintiff and Intervening Plaintiff had and have about the ward's belief as to his "real" domicile is hearsay testimony—and not much of that. Further, whether the ward's grandmother considered the ward's "real" domicile as a bedroom in her home is utterly immaterial. It's what the ward considered—and at this point in time it can only be inferred from his actions. Those actions were discussed in detail in Auto-Owners' previously submitted Application and Reply and will not be repeated here.

Auto-Owners acknowledges that Michigan's Rules of Evidence do have what has become somewhat inelegantly known as the "catchall exception" to the hearsay rule. MRE 804(b)(7)[1] requires, however, that statements admitted under the exception have "equivalent circumstantial guarantees of trustworthiness...." The reference to "equivalent circumstantial guarantees of

[1] The Plaintiff's ward is unavailable to testify due to his incapacitated condition. See MRE 804(a)(4).

trustworthiness" is plainly a reference to the other exceptions under MRE 804(b)(7)—former testimony, statement under belief of impending death, statement against interest and statement of personal or family history. Offhand remarks in informal settings about a possible return to Michigan made by someone who was married with a domicile in Arkansas plainly do not have anything remotely approaching the "circumstantial guarantees of trustworthiness" present in former testimony, statements under the belief of impending death, against interest or of personal or family history[2].

Auto-Owners offers this for the Supreme Court's consideration. The ward's marriage to Tonya Lynn Barber in Winston-Salem, North Carolina in 1997 was established by a copy of the North Carolina marriage license (Exhibit H to Auto-Owners' Application). Plainly that is a major factor in determining the ward's belief as to where his "real" domicile was. The only "evidence" the Plaintiff and Intervening Plaintiff had to refute the ward's status as being married to Ms. Barber at the time of the accident was the Plaintiff's "belief" that if her brother had actually gotten married, she would have been informed. Certainly a person's "belief" that if a legally documented event had taken place, the person would have been informed of it does not create a question of fact about the event!

II. Inasmuch as the Legislature did not give a specific definition to "domiciled in the same household" in MCL 500.3114(1), it must be given its customary and ordinary usage—and that means the Plaintiff's ward was not domiciled with Beverly Krumm at the time of the accident.

The cardinal rule of judicial statutory interpretation is to give effect to the intent of the Legislature. *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 313; 645 NW2d 34 (2002). The intent is "reasonably inferred" from the words used in the statute. *Id.*; see also *People v Thompson*,

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[2] What one plans to do in the future is patently not "history" because it is something that *may* or *may not* happen. History is, ultimately, about something that *did* or *did not* happen.

477 Mich 146, 152-153; 730 NW2d 708 (2007). Words not given specific definition in a statute by the Legislature are to be given their "plain and ordinary meaning." *Id.*; see also MCL 8.3a. Standard or lay dictionaries are used as aids in interpretation when the statute uses common words or phrases that do not have unique legal meanings. *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000); see also *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). Conversely, if a statute uses, but does not define, a legal term, its common and approved usage can most likely be found in a legal dictionary. *Id.*

The question then becomes whether "domiciled" is a nonlegal term or a legal term. The 1984 edition of *Funk & Wagnalls Standard Desk Dictionary*, arguably the epitome of a lay dictionary, defines "domicile" as a "home, house, or dwelling...The place of one's legal abode." The 1959 edition of *Webster's New World Dictionary of the American Language* defines "domicile" succinctly as "a home; residence." The definition given by *Black's Law Dictionary* (8th ed. 2004) is, not surprisingly, more verbose: "The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."

Regardless of whether the definition of *Funk & Wagnalls*, *Webster's* or *Black's* is used, Plaintiff's ward was not domiciled with **any** Michigan resident at the time of the accident in North Carolina. He was still married to Ms. Barber at the time of the accident, and had lived with her for an extended period of time at various locations in Arkansas before the accident in North Carolina. He really had no connection to his grandmother's home in Michigan beyond having lived there at one time in the past. His grandmother, who was also his adoptive mother, did keep some of his things and had a bedroom for him.

It may be that the *grandmother* considered the ward as domiciled in her home in Michigan, but the issue is what the *ward* considered as his domicile. It's not clear that the ward ever gave it a lot of thought, what with his decidedly nomadic lifestyle, but all of the concrete, undisputed evidence such as his physical location prior to the accident make it clear that his "domicile," under either a lay or legal definition, was not with his grandmother in Michigan at the time of the accident.

It is worth noting that one of the major reasons the ward left Michigan for Arkansas was the undisputed existence of Michigan warrants for his arrest. Those warrants were still outstanding at the time of the accident in North Carolina. Thus, the ward had good reason to remain outside Michigan. The summary disposition granted Auto-Owners should therefore have been affirmed and not reversed by the Court of Appeals.

III. Just as they have with respect to expert testimony, trial courts have a "gatekeeper" role with respect to making sure that cases do not go to a jury on the basis of unbridled guess, conjecture and speculation.

In *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court gave trial courts a "gatekeeper" responsibility with respect to expert testimony. Essentially, an expert's proposed testimony must meet certain standards of reliability and acceptance within the scientific community before it can be presented to a jury.

The instant case does not involve expert testimony, only lay testimony as to what a limited number of witness believe the Plaintiff's ward thought about his "domicile" at the time of the accident in North Carolina. The trial court, Judge Murphy, found that no reasonable juror could legitimately conclude that the ward was domiciled in Michigan at the time of the accident. The Court of Appeals held there was a question of fact on the matter that should go to the jury.

Auto-Owners submits to this Supreme Court that trial courts have a "gatekeeper" responsibility with respect to whether cases should be presented to a jury, a responsibility that was correctly exercised by the trial court in the case at bar.

It is well settled in case law that matters may be taken from a jury whenever the trial court concludes that no reasonable juror could decide the dispositive fact in the case in a way that would allow one side to win. *Fundunburks v Capital Area Transportation Authority*, 481 Mich 873; 784 NW2d 804 (2008); *Nguyen v Professional Code Inspections of Michigan, Inc.*, 472 Mich 885; 695 NW2d 66 (2005); and *Prebenda v Tartaglia*, 245 Mich App 168, 170; 627 NW2d 610 (2001).

Fundunburks involved a personal injury accident while the plaintiff was exiting a bus. The only way the driver could be sued was if he had been grossly negligent at the time of the accident. A majority of this forum found that "no reasonable juror" could conclude, based on the evidence in the record at the time the trial court denied the defendant's motion for summary disposition, that the defendant had been grossly negligent. The trial court thus erred in denying the motion, and the Court of Appeals erred in affirming the denial.

Nguyen was a more complex case, involving the issuance of a stop work order on a construction project by a government official. This Supreme Court unanimously concluded that "no reasonable juror" could conclude that the official had acted recklessly and with a substantial lack of concern over whether harm resulted to another as a result of his conduct. The trial court had been correct in granting the defendant summary disposition, while the Court of Appeals had erred in finding a question of fact existed on the matter.

Finally, in *Prebenda* the plaintiff, a business invitee, had been injured on the defendant's property. The plaintiff claimed she had been injured by a dangerous condition on the property.

Both the trial court and the Court of Appeals found that "no reasonable juror" could have found the condition, a door that opened outward leading to a hallway that lacked a window, was dangerous.

This is only the briefest selection of cases where it was held proper for trial courts to take matters from juries on the basis no reasonable juror could have found for the nonmovant. This is the gatekeeper function that trial courts must have and must be free to exercise when appropriate in order to insure that just results are obtained.

While it may be touching that the ward's grandmother and adoptive mother kept a room and some of his things for him long after he married and moved out of Michigan, that is not a legitimate basis for a reasonable person to conclude that the ward, prior to the North Carolina accident, considered that room his domicile, at least when all the other indicia of domicile—marriage, place of abode, length of absence, the reason he fled Michigan in the first place, and so on—are considered. To do so would mean engaging in guess, conjecture or speculation—and that can never be a basis for determining a fact. *Skinner v Square D Company,* 445 Mich 153, 162; 516 NW2d 475 (1994)[3].

Fundunburks is similar to the case at bar in that the Supreme Court entertained oral argument on the defendant's application for leave to appeal. *Nguyen* was disposed of on the basis of the application alone. Auto-Owners suggests that the case at bar should have the same result as *Fundunburks*—reversal of the Court of Appeals after oral argument on Auto-Owners' Application.

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[3] *Skinner* was primarily a products liability case and the issue was proximate causation. However, Auto-Owners submits that the *ratio decidendi* of *Skinner* was the need for "circumstantial proof" that "must facilitate reasonable inferences" and the careful of avoidance of anything that could be considered "mere speculation" applies to the matter at bar. *Id.* at 164-165. Arthur Krumm's marriage, and his numerous domiciles in Michigan and Arkansas other than his room at his grandmother's house are all facts that cannot be disputed by the Plaintiff and the Intervening Plaintiff. All the Plaintiff and Intervening Plaintiff have to counter this admissible evidence is inadmissible hearsay—and inadmissible hearsay that at, bottom, is merely guess, conjecture and speculation as to what Arthur Krumm would have done at some point in the future had he not been involved in the North Carolina accident.

However, Auto-Owners would be most pleased to fully brief and argue the issue presented in its Application, or whatever issues the Supreme Court directs, if the Supreme Court decides after oral argument to grant Auto-Owners' Application.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, as well as those previously presented in its Application for Leave to Appeal and Reply, Auto-Owners respectfully requests this honorable Supreme Court to enter an order reversing, vacating, and holding for naught the March 24, 2009 decision and opinion of the Court of Appeals in the above-entitled cause of action, thus reinstating the January 7, 2008 Order of Judge Murphy, or, in the alternative, enter an Order granting Auto-Owners' Application for Leave to Appeal the March 24, 2009 decision and opinion of the Court of Appeals to this Supreme Court.

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